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# The Political Content of Legal Theory

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# GENDERING THE PENSION PROMISE IN CANADA: RISK, FINANCIAL MARKETS AND NEOLIBERALISM

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## ABSTRACT

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This article argues that retirement income provision in Canada is built on gendered assumptions, which produce material disadvantage for women. These inequalities are being exacerbated by current neoliberal trends towards the ‘marketization’ and individualization of pension provision, supported by tax, securities and corporate legal norms. The argument is developed using recent legislative changes to the operation of the Canada Pension Plan and recent developments in the regulation of mutual funds in Ontario as case studies. The article concludes by sketching out some possible points of departure for feminist interventions in pension privatization debates.

THIS ARTICLE uses recent reforms to retirement income policies in Canada as a site for examining aspects of the material impact of neoliberal restructuring on Canadian women, as well as the role of law in furthering this agenda. The argument of the article is developed by first demonstrating that the Canadian pension framework, outlined briefly below, has been and continues to be fundamentally gendered, both in its impact on individual women and in the categories of analysis that are used to undergird the system. Second, it is argued that this ‘genderedness’ is being intensified in the current era of economic restructuring, such that many women are being adversely materially affected. This is occurring because of political choices that are being made, not just in Canada, to ‘marketize’ pension policy, that is, to link it even more closely to the operation of financial markets. Two specific examples, (1) reforms to the Canada Pension Plan (CPP) and (2) legal treatment of mutual funds, will be described. One conclusion to be drawn from these examples is that the gendered repositioning occasioned by neoliberalism varies across class and sexuality. Thus, the shift to financial markets, accompanied as it has been by the ambiguous results of gender-oriented activism in political debate about the CPP described below, suggests that feminist scholars may need to

both reconsider their focus on the welfare state as the locus of materialist emancipatory politics (Fraser, 1998) and pay close attention to the legal regimes that facilitate this market-oriented restructuring.

It should be pointed out, of course, that it is not only by means of pension reform that the Canadian state is being restructured in accordance with neoliberal principles, with gendered implications. The research presented in this article is part of a larger collaborative project<sup>1</sup> which is investigating the implementation of privatizing policies in a variety of social and legal arenas in Canada, such as labour markets, family and welfare policies, tax policy, immigration, criminal justice, health policy and reproductive choice and technologies. The particular focus of the project is the role of law in privatization, both in terms of the myriad ways in which law and legal regulation are implicated in this economic and social restructuring, and also assessing the possibilities for using law in progressive ways to counter the gender disadvantage which it is argued is occurring.

#### RETIREMENT INCOME PROVISION IN CANADA

In a number of countries, retirement income policies tend to involve a mixture of 'public' and 'private' provision, and thus to reflect the interdependence of state and market. In Canada, retirement policy is usually characterized as having three 'tiers'. The first tier is represented by a universal state benefit, known as the Old Age Security Program.<sup>2</sup> Funded

from general revenue, this is meant as an anti-poverty measure and it is both taxable and repayable, above a threshold amount, by the more well-off. The second, the CPP, has been since 1966 a publicly administered 'paygo' plan (where the contributions of today's workers support today's pensioners) from which all workers, and in some cases their spouses and survivors, will receive benefits. These benefits are financed by mandatory contributions from employers and employees, based on a percentage of income. In the 'income replacement' language of pension policy, CPP benefits are pitched so as to replace about 25 percent of pre-retirement income, up to the Canadian average income of C\$35,800 (1997 figures).<sup>3</sup> The third tier is composed of a mixture of employer-sponsored pension plans (RPPs), and individual 'registered retirement savings plans' (RRSPs). With respect to the former, it should be pointed out that employers are not required to provide pension plans for their employees. In the latter, employees voluntarily deposit money in a variety of investment vehicles provided by financial institutions, and most notably in Canada by the mutual fund sector. Such investment is facilitated by the fact that employees no longer make contributions to CPP beyond the average wage (Deaton, 1989: 228–9). While Canada is one of the 'developed' countries that has relied most heavily on the labour and financial markets to provide retirement income for its citizens (Esping-Anderson, 1990; Orloff, 1993), the state and its laws have been implicated in these tiered retirement sectors at all levels. Thus, the state accomplishes the

direct provision of income through the OAS, the collection of CPP contributions and, until recently, lending out the modest surplus in the CPP fund to provincial (or local) governments at below-market interest rates, the regulation of employer-sponsored plans and the provision of generous tax deductions to individuals sheltering income in RRSPs.

### THE GENDERED LOGIC OF PENSIONS

Retirement pensions may be understood as a form of social insurance against risk, in this case the risk of outliving one's material resources when other ways of accessing income are less tenable (Rose, 1996; Sohrab, 1996). Understood as social insurance, they were one of the lynchpins of the post-Second World War welfare state, which attempted in a variety of ways to secure the 'pension promise'. Yet in most welfare states the capacity to access this insurance against poverty at an advanced age derives not primarily from being a citizen of a particular polity but either from a prior connection to the paid labour market or from being in a familial relationship with, or a survivor of, a wage earner (Donnelly, 1993; Orloff, 1993). Both the second and third tiers of Canada's retirement policy, as well as the GIS and Spouse's Allowance components of OAS, are linked in various ways to wage earning or family relationships. This point implies that conceptually, as well as in practice, the distribution of the risk of being materially disadvantaged in old age will vary across gender and sexuality, since women's differential relationship to the paid labour market reflects

their particular role in social reproduction (MacDonald, 1998).

With respect to the Canadian labour market, Townson has documented extensively the phenomenon whereby women are much more likely than men to be employed in 'nonstandard' work, which she defines as part-time work, self-employment, temporary work, or multiple jobs with a series of employers (Townson, 1997: 2–3). In 1994, for example, 40 percent of women, as compared with 27 percent of men, worked in nonstandard jobs (1997: 13). Specifically, 24 percent of all women workers compared with only 8 percent of men were in part-time jobs, most often in the retail trade and other consumer services (1997: 5, 8). This point is one not only about labour market participation rates but also about pay. Thus, 'the average earnings of all women, including those who worked part-time or in other types of work which was not full-time, full-year, were \$20,219 in 1995 which was still only 65% of the average earnings of all men at \$31,053' (1997: 16). The impact on the ability to make contributions to labour market-based pension schemes, and to receive benefits on the basis of contributions, is obvious. As Orloff expresses it (1993: 314), 'Women's inferior status in the work force means that women are disproportionately disadvantaged when benefits reflect work related inequality'. In terms of family status, on the other hand, Statistics Canada reports that, in 1993, 56 percent of all senior women living alone or with unrelated persons had 'low incomes'.<sup>4</sup> As Leonard and Nichols put it (1994: 9–11), 'for the majority of women, their marital status will determine their material conditions in old age, since

poverty is far more pronounced among single elders than among married couples'. McDonald's 1997 study of retired widows, who 'constitute approximately 47% of the senior population', and 49% of whom 'lived below the low income cut-offs of Statistics Canada', leads her to reinforce the claim that 'married women are one husband away from poverty' (McDonald, 1997b: vi-vii).

Further, Townson claims (1995: 6) that there are significant differences between men and women in attitudes to retirement. In a survey she completed of the 'retirement readiness' of Canadian women at midlife (i.e. ages 45-54), 'women seemed much less certain than men about the age at which they would retire'. She argues that 'the fact that 41% of women aged 45-54 have no specific retirement date in mind may reflect their lack of financial planning for retirement as well as uncertainty about their financial future and what measures they will have to take to secure it'. And of course, in a demographic sense the extent of the risk of inadequate pension income is gendered, in that life expectancy rates ensure that women will be dependent on pension income for a greater proportion of their lives.

#### NEOLIBERALISM, RISK AND LAW

In the current, now well-entrenched, era of economic restructuring known as neoliberalism, the gendered exposure to risk that pension logic represents has intensified. This restructuring, which has been well documented in many developed and developing countries and across a variety of social



policy fronts, is signified by the ascendancy of the market over and inside the state, with policy outcomes being determined by the market rather than by central planning (Brodie, 1997; Miller and Rose, 1990). Strategies of commodification (exposing social provisioning to a market delivery system), retrenchment (removing various welfare benefits provided by the state) and deregulation (dismantling the particular legal apparatus by which the state governed, or 'intervened in' the economy) are all said to be implicated in the phenomenon (Brodie, 1997). These strategies are accompanied by a shift to what Rose (1996: 342) calls 'a politics of risk', whereby individuals are being required increasingly to take responsibility for their own and their families' financial and personal security into the future, with markets for risk management products emerging in a variety of areas. Despite neoliberal claims to gender neutrality in these restructuring efforts (Cossman, forthcoming), a political economy that relies increasingly on the market to produce social policy may well have a differential effect across genders, given women's often more fragile connection to labour and other markets and greater dependence on the state to recognize the financial implications of their decommmodified labour. This requires close attention to the gender politics of risk that neoliberalism entails, not only in terms of obvious issues of material well-being in the form of social security benefits payable and contributions exacted (Sohrab, 1996), but also in terms of the actual operating practices of a market based delivery system.

Social theorists who posit the shift to the 'risk society' (Beck, 1992; Ericson and Haggerty, 1997) tend to see it as accompanied by techniques of

governance (Hunt, 1999: 9–10) emphasizing actuarialism, targeting, ‘privatized prudentialism’ (O’Malley, 1992) and ‘governance of the self’. Thus, traditional legal forms of governance are decentred in the analysis, and fragmented into codes of practice, self-regulation, or regulation by contractual term (Cotterrell, 1995: 280; Rittich, 1998; Rose, 1996: 350–1). However, it remains important to track changes in legal forms of governance in neoliberalism, and to clarify the extent to which they are implicated in producing inequalities of risk distribution (Ericson and Haggerty, 1997: 120–3; Pearce and Tombs, 1996: 449). If market norms are in the ascendancy, the continued relevance of the insight of critical legal scholars, among others, that law and legal norms construct and shape markets and market institutions in distinct ways is obvious (Blackburn, 1999: 6–8; Gordon, 1987; Pearce and Tombs, 1996: 432). In terms of pensions specifically, Esping-Anderson (1990: 79) has pointed out that ‘pensions account for more than 10% of GDP in many contemporary nations’. Accordingly, debates have taken place in many countries, Canada among them, about the need for market solutions to alleged problems caused for the welfare state of unfavourable demographic projections, involving a declining workforce and an aging population. Institutions such as the World Bank have targeted pension systems in economies in transition as in need of a privatizing overhaul (Blackburn, 1999: 14–15). The most radical and oft-cited example of a shift to a financial market-based pension system has occurred in Chile. Here a pay-as-you-go system was abandoned in favour of a scheme requiring workers to pay 10 percent of their income a year into an individual

retirement account of their choice, which they control and invest as they wish (Fazio and Riesco, 1997). Similar proposals in the United States, involving so called USAs (universal savings accounts) have been floated by the Clinton administration. Such schemes have obvious material advantages to private providers of investment advice and transactions (Blackburn, 1999: 7–8; Deaton, 1989). It is in this international context that policy and legal changes in two elements of Canada's retirement income pyramid are discussed in the remainder of this article. These are (1) recent debates about the viability of the Canada Pension Plan and (2) the changing regulation of mutual funds.<sup>5</sup> The focus of the discussion will be on how these developments have produced the material repositioning of Canadian women, as well as how legal forms of governance are implicated in this repositioning. Even more significantly, the contrast that will become visible between developments in relation to CPP as opposed to mutual funds suggests clearly that discussion of the trend towards privatization in pension provision needs to be more explicit about how the implications vary according to class position.

#### THE GENDER POLITICS OF CPP REFORM

The legislative changes to the operation of CPP that took place in Canada in the fall of 1997 (CPP Investment Board Act) were preceded by widespread debate at various levels of government, as well as by public and 'expert'

consultations. This round of debates is usually taken to have begun in early 1994, when the Chief Actuary's periodic report on the finances of the CPP, required by its governing legislation concluded that 'the recession and higher than anticipated disability claims would necessitate increasing contribution rates higher than previously expected' (Townson, 1996: 30). The federal and provincial governments issued a discussion paper in the mid-1990s and held public consultations across Canada,<sup>6</sup> in which a 'crisis of unsustainability' of the CPP was asserted. As is demonstrated in more detail in the discussion to follow, the result of these public and parliamentary debates was that while government proposals to reduce the amounts of benefits payable from CPP were largely successfully opposed, contribution rates were increased. Meanwhile, the investment of CPP funds in the financial markets rather than in government bonds, with the objective of increasing returns to the fund, was the centrepiece of the legislative changes. In feminist activist terms, this was an ambiguous result, since the most immediately regressive aspects of the proposals, in relation to benefit issues, were successfully resisted by the leftwing politicians, seniors' organizations and women's organizations who spoke against them in consultation sessions. Yet the more long-term material and discursive effects of the legislative changes, which included destabilizing the redistributive aspects of the Plan, valorizing market-based solutions to pension provision and introducing norms of private law to support this, were far less contested. Four key themes will be isolated from these public and parliamentary reform

debates, as they illuminate both how neoliberal practice becomes persuasive and how gendered material disadvantage was thereby intensified.

#### *DEMOGRAPHICS*

As in other countries, the reforms to CPP that were proposed and discussed were premised on a governmental claim, supported by many pension experts (Pesando, 1997; Robson, 1996; House of Commons, 1997e), of the unsustainability of CPP in its then existing form. This claim was based primarily on demographic projections of a declining workforce whose contributions could not meet escalating claims by increasing numbers of pensioners at the existing contribution levels. An aspect of this argument was the claim that the problem with CPP was that ‘early generations did not pay enough’ into the Plan relative to the amounts of benefits they were currently receiving (Battle, 1996: 6–7). As the Federal/Provincial Consultations Report put it, ‘The basic challenge facing Canadians is one of fairness and equity. For the past 30 years, Canadians have paid much less than the benefits they are receiving, or will receive, are worth. Future generations will be asked to pay considerably more for the very same benefits’ (Federal/Provincial/Territorial CPP Consultations Secretariat, 1996a: 9). This opposition between the interests of young workers and seniors was used by some expert commentators to mount a more general onslaught on the redistributive aspects of public pension provision. Thus,

for example, Robson (1996: 25) argued that ‘These transfers from young to old cannot be excused by casting the CPP as though its primary purpose were redistribution rather than income replacement. . . The CPP provides benefits similar to those available from private pension plans and insurance policies but does so in a way that is tilted dramatically against today’s children’.

The solutions proposed by the government in its initial information paper included a combination of ‘early increases in contribution rates and reduced benefits or reduced access to benefits’ (Robson, 1996: 10). The demographic premise on which these proposals were made was contested by left-leaning politicians and social policy analysts mainly by pointing to the relative contribution rates of Canadian workers vis-a-vis workers in European countries, where more robust public pension systems, requiring higher contribution rates, were assumed to exist. Yet it is clear that the demographic analysis on which the panic about unsustainability was based was intrinsically gendered in two ways. First, it took no account of the issue of women’s unpaid work, so that the only work that counted for these demographic calculations was ‘paid’ work (Waring, 1988/90). Nor did it acknowledge the changing nature of paid work more generally (McDonald, 1997a; McDaniel, 1997). The terms of the debate obscured a broader analysis that would recognize not just that there may be fewer workers in the paid labour market in the future, but that those workers’ earnings are not growing and that workers, especially women, tend no longer to be in continuous employment (McDaniel, 1997). This failure to problematize

the nature of the labour market beyond a focus on a declining number of workers silenced or discounted a variety of alternative political solutions posited by alternative definitions of the 'problem' of CPP. These would include: raising above the average wage the ceiling whereby contributions to CPP are still required to be made, thereby increasing the flow of contributions from higher-income earners; intensifying political efforts at job creation or other ways of increasing labour force participation, especially women's participation; removing or decreasing the tax deduction that favours investing in private RRSPs, mostly by male workers (Young, 1997) or, even more radically, problematizing the assumed link between labour markets and pension entitlements. Despite the interventions of women's organizations like the National Action Committee on the Status of Women (NAC) (House of Commons, 1997f), the political solutions ultimately forged were based on a refusal to recognize the gendered nature of the labour market.

#### *BENEFITS AND CONTRIBUTIONS*

The benefits received by women from CPP are typically lower than those received by men, since their income-related contributions are lower. However, CPP's coverage of part-time workers and recognition of time out of the paid labour force because of family responsibilities in the assessment of benefits,<sup>7</sup> as well as the availability of spousal pension sharing and survivor

benefits, may all be seen as better or worse attempts to recognize the gendered material risk faced by women. The persistence of a traditional discourse of family here, of course, has meant that women in lesbian relationships are unable to qualify for the benefits of pension sharing or survivorship. However, this issue is under active political reconsideration, in part as a result of successful legal challenges on the basis of Charter-granted equality rights<sup>8</sup> (*Rosenberg*; Young, 1999; McCarthy, 1999).

Meanwhile, the 1997 legislative changes have resulted in: (1) an increase in contribution rates from 5.85 percent of wages, up to the average wage in 1997, to 9.9 percent by the year 2003, at which the rate will be then held steady; (2) freezing the year's basic exemption (the amount below which no contributions are required) at \$3,500 of income, instead of being indexed to wages. In contrast, as mentioned earlier, the maximum amount at which contributions are no longer required to be made was not raised from \$35,800; (3) the ultimate retirement benefit to be based on an average of the last five years' yearly maximum pensionable earnings (YMPE), instead of the last three years;<sup>9</sup> (4) a reduction of the maximum death benefit payable to survivors to \$2,500, down from \$3,500 which was likewise formerly indexed to wages. Collectively, these changes will adversely affect those women whose participation in the labour force is low-paying and fragile and will reduce the distributive features of CPP. As Townson points out, lower-income workers may find it hard to assimilate such a sharp increase in contributions over a short period since they pay contributions on the



whole of their income, as opposed to those earning higher than average earnings, who contribute only on a portion. The difficulty will be exacerbated for the self-employed, who have to fund both sets of contributions themselves (Townson, 1997: 61–4). Freezing the year's basic exemption will over time draw more very low income workers into the contributions requirement (Townson, 1997: 62; NAC in House of Commons, 1997f: 1625). Reducing the death benefit payable to survivors is also more likely to negatively affect women, given gendered survival figures. Basing the benefit on the last five years of earnings as opposed to three will result in lower pensions generally, with adverse effects for those who rely mainly on CPP for retirement income.

#### *STRATEGIC USE OF GENDER-BASED ARGUMENTS*

Yet it would not be true to say that the consequences for women of the government's proposals were ignored entirely in the debate. In fact they were highlighted in responses across the political spectrum. Thus, labour spokespersons opposed any reductions in benefits on the grounds that 'they would adversely affect low-income Canadians, fundamentally alter the social insurance side of the plan and adversely affect women' (Federal/Provincial/Territorial CPP Consultations Secretariat, 1996a: 22). Liberal Parliamentary Secretary Valeri referred in parliamentary debate to the 'gender analysis that was put forward that showed that in fact women

would receive \$2.56 of benefits for every dollar of contribution' (House of Commons, 1997b). Meanwhile, the official opposition [Reform] party leader, Preston Manning, said

When I look at the bill I am reminded that we are dealing with the principal source of income of people who are no longer in a position to add to their income. All of us know of middle aged [and] elderly women who invested most of their lives in raising children in the home and who entered the so-called official workplace . . . late in life or not at all and therefore qualify for little or no CPP benefits . . . [We] should keep the needs of these women uppermost as we consider pension reform. (House of Commons, 1997a)

The latter position certainly evinces a concern for that group of women who are most disadvantaged by the enduring link between labour markets and pension entitlements. However, less consideration was extended to those women who remain in the paid labour force in marginal and insecure positions. No suggestion was made that it might be worth examining the possibilities of restructuring the labour market to allow the enhanced participation of women (Fraser, 1998). Nor did the solution that was offered by the Reform Party to mitigate this disadvantage involve an uncoupling or a deemphasis of the link between pension entitlements and labour force participation. It actually did support dismantling the CPP entirely, but in order to move to individual retirement savings accounts to which employers and employees would contribute. Thus the Reform Party (Ablonczy) called

for

moving . . . to a fully funded system based on individual accounts while protecting the benefits of current seniors. This means that individuals will own all the assets in their account and their retirement benefits will be substantially greater. When they die their children and their spouse will inherit the capital. This would go a long way toward eliminating poverty for elderly widows, for example. . . Countries from around the world are following the example of Chile in moving from publicly to privately owned and managed pensions. . . (House of Commons, 1997a)

While this proposal was ultimately unsuccessful in this iteration of the debate, it should be noted that the Reform Party's position is a clear rejection of a socially redistributive element to the CPP. The association of a market-based pension delivery system with enhanced financial autonomy should be closely examined by feminists, especially if it is assumed, as the Reform Party did, that women will be recipients of pension income not in their own right, but by the inheritance from their families of market-based pension gains. Further, as Philipps (forth coming) points out in the context of recent developments in Canadian tax policy, one of the ironies of neoliberal discourse in Canada is the possibility of appropriation of feminist knowledges and arguments to further political agendas which are not typically in sympathy with feminist objectives.

In the end, what are we to make of the fact that the more radical policy options that were initially put forward by the government's information

paper (eliminating survivor benefits altogether, only partially indexing pensions, reducing the rate at which CPP benefits would replace income from 25 percent down to 22.5 percent, raising the age of entitlement, reducing the number of non-working or low-income years that could be dropped out) would have had even worse consequences for women but ultimately were not enacted (Federal/Provincial/Territorial Governments of Canada, 1996b)? Is this to be read as a success for the feminist activists, such as the representatives of NAC who appeared before the SCF (to which the CPP bill was referred after its second reading in parliament), or other women's organizations who participated in the public consultations on CPP and focused primarily on the benefits proposals made by the government?<sup>10</sup> While at first glance it may appear to be so in the sense that more regressive proposals were avoided, if taken in the context of the legislative reforms as a whole, there is little cause for satisfaction. This is because the price that was paid for maintaining benefits and access to benefits was precisely the 'marketization' of the CPP, as the following discussion demonstrates.

#### *INVESTMENT STRATEGY AND FUND GOVERNANCE*

The chief innovation of the 1997 legislation was a shift to a more financial market-based investment strategy for CPP, with the aim of maximizing returns to the fund and building up its capital. This was widely viewed by

‘business, labour and seniors groups’ as a compromise solution to the problems of the CPP’s so-called ‘unfunded liability’. Indeed, the consensus about the need for a shift to the financial markets extended to women’s organizations which ‘supported improved investment of the CPP fund’ (Federal/Provincial/Territorial CPP Consultations Secretariat, 1996a: 22, 25). Previously, any surplus in the fund not needed to meet current obligations to pensioners had been lent to provincial governments at below-market interest rates to accomplish various public finance projects (Deaton, 1989: 223–5). Following the passage of the CPP Investment Board Act, CPP funds are now being invested in the equity markets.<sup>11</sup> A new investment board has been established to manage any amounts transferred to it ‘in the best interests of the contributors and beneficiaries’ under the Act. It is to invest its assets ‘with a view to achieving a maximum rate of return, without undue risk of loss’ (s. 5). The attempts of labour spokespersons to advocate investment objectives such as ‘meeting economic goals for the country’ or ‘secondary objectives to promote economic development’ or ‘regional economic development’ (Federal/Provincial/Territorial CPP Consultations Secretariat, 1996a: 36, 57) were roundly criticized by financial planners, investment dealers and pension experts who appeared in a special consultation session before the legislation was enacted. This latter position was supported by the government in drafting the legislation. As in the Social Security debate in the US, a major concern expressed by some participants was the possibility for ‘government intervention’ in CPP investment

decisions (Federal/Provincial/Territorial CPP Consultations Secretariat, 1996a: 36; Manning in House of Commons, 1997a). The legislative solution here was to allow the new CPP Investment Board to ‘hire qualified investment professionals to manage the day-to-day investment decisions at arm’s length from governments’ (House of Commons, 1997c: 2699).<sup>12</sup>

The tradeoff for minimizing ‘government intervention’ in the investment activity of the newly marketized CPP was a variety of governance norms drawn from corporate and trust law. These include a fiduciary duty to the Investment Board imposed on individual directors and officers who should have ‘proven financial ability or relevant work experience’, the ability to hire qualified investment professionals with discretionary authority to manage the fund, and the requirement to invest according to a ‘prudent portfolio’ standard, as elaborated in a written, publicly available investment policy required by the draft regulations. As the legislation was being passed, the only issue of major debate with respect to the investment strategy had to do with whether the fund should be invested actively or passively (i.e. replicating an existing stock exchange index). The debate here centred on various pension funds’ experiences with index-based investing, along with a concern that this particular fund (estimated to be some C\$60 billion by the year 2006) would be too large to make passive investing viable. In the end, the draft regulations require passive investing.<sup>13</sup> In this sense, as the ‘governmentality’ literature would suggest (Miller and Rose, 1990), a

financial market-based risk management strategy and the employment of financial 'expertise' accompanies the use of legal governance norms derived from corporate and trust law. These strategies are employed in an attempt to control the now enhanced market risk resulting from the turn to financial markets for pension funding. It should be noted, however, that the establishment of a fiduciary duty to act in the best interests of contributors *and* beneficiaries simply replicates, or submerges, the apparent interest group antagonisms that prompted the legislative changes in the first place. It also suggests that the way the Board operationalizes its obligation to act in the interests of the entire Canadian working population will be significant (Cooper, 1997).

Meanwhile at the House of Commons Standing Committee on Finance review of the legislation after second reading, NAC had raised the issues of whether (1) the investment board had to consist entirely of financial professionals, or whether room should be made for representatives of CPP beneficiaries and (2) why there had been 'no discussion of the possible use of ethical investment criteria' for the fund (NAC in House of Commons, 1997f: 1630). This attempt to broaden the base of participation in running the fund as well as its investment goals was vigorously and successfully resisted by pension experts. With respect to participation, all that the legislation ultimately requires is that there be a biennial public meeting in each participating province, but it does not embody the Senate Committee on Banking Trade and Commerce's recommendation that at least one director of the fund attend. Instead the legislation (s. 52) requires only that 'one or

more directors or officers' attend to meet with any of the beneficiaries whose interests they are to maximize. In legislating for fund governance therefore, a singular interest in fund maximization, to be accomplished by using a circumscribed fiduciary obligation to govern low-visibility decision making was privileged, and articulated through a discourse of preventing 'government interference', rather than of attempting to further democratic participation or accountability (Valverde et al., 1999: 29–30).

#### CPP AND NEOLIBERALISM

The outcome of the CPP debate suggests the ambiguities associated with a 'privatization' discourse, since the result here was that the CPP would retain the features of mandatory labour market-wide contributions and the payment of defined benefits, but that funds would be raised in private equity markets to supplement contributions. Yet a move away from a commitment to collective responsibility for pension provision has clearly taken place (Guest, 1980/97: 293), as evidenced partly in the debate about benefit and contribution issues, and partly in the shift to a market-based investment strategy accompanied by governance norms drawing on risk management and fiduciary obligations, according significant discretionary authority to investment decision makers. A major discursive as well as material effect of the 1997 legislative changes was that returns from the financial markets were considered a preferable alternative to socialized reliance on other workers in



a pay-as-you-go system (O'Malley, 1992: 259, 261). This discursive shift has implications for the future of a redistributive rationale for pension entitlements generally, which is likely to have further negative effects for women. A gendered example of the neoliberal attack on redistribution from workers to pensioners as the *raison d'être* for pension policy can be found in the comment of Michael Walker, Executive Director of a prominent Canadian thinktank, the Frazer Institute, that '[U]nder the CPP women who live longer collect more in total benefits but do not pay higher premiums. This is, simply put, inequitable'. On being pressed further about this, Walker responded 'You're subsidizing the women's pensions with the contributions of the men . . . that's confusing an issue of subsidy with an issue of paying for people's pensions. I don't think we should be doing that either' (House of Commons, 1997d). As a result of the CPP legislation, pension contributors and recipients were transformed into stakeholders in an investment fund by means of discourses of financial rectitude, and individualized gender-neutral 'fairness', with little opportunity provided to render the ensuing decision making democratically accountable.

### MUTUAL FUND REGULATION

In the midst of the panic about the future of CPP, the significance of RRSPs to Canadian retirement planning is increasing. This phenomenon is

supported by federal government provision of favourable tax treatment to amounts invested in RRSPs (Young, 1997) as well as a decline in employer sponsored pension coverage (Townson, 1997). Up to a ceiling of some C\$15,500 of income, amounts contributed to an RRSP may be deducted from income before calculating the tax payable. Further, tax payable on the income earned on these savings is deferred until the funds are withdrawn, although this can be before the individual retires. As Young has argued with respect to both occupational pension plans and RRSPs, investment patterns here are gendered, in the sense that women are less likely to work for large employers who offer pension plans and tend to have less 'discretionary income' to contribute to RRSPs (Donnelly, 1993; Young, 1997: 320–21). She also points out that the possibility for wage earners to contribute to spousal RRSPs (i.e. a transfer of funds into the plan of a lower-income spouse) reinforces traditional gender relations within families. Similarly, Townson reports that men, on average, contribute a smaller percentage of their average earnings to RRSPs than do women, but argues that this is because men are more likely than women to have employer-sponsored plans, which limit the amounts that can be contributed to an RRSP (Townson, 1995: 56, 1997: 44). Statistics Canada reports that, overall, more men than women invest in this fashion and in greater amounts (Townson, 1995: 89). In 1993 the average amount contributed by women was \$2,931 compared with an average of \$4,360 for men. Individuals in nonstandard jobs are also more likely to use retirement savings accumulated in RRSPs in advance of retirement, for financial support during periods of unemployment or when

withdrawing from the paid workforce because of family responsibilities (Townson, 1997: 49). A key point however is that ‘nearly half of all RRSP deductions are claimed by the 12.5% of tax filers with the highest incomes’ (Townson, 1997: 57; Dickinson, 1996: 189; Guest, 1980/97: 283). It is argued that foregone government revenue as a result of tax exemptions for private pension plans amounts to about \$12 billion a year, ‘about 40% of the total cost of public pension programs such as OAS/GIS and the CPP’ (Guest, 1980/97: 283).

Meanwhile the popularity of the mutual fund, a collective investment vehicle similar to a unit trust or managed investment, whose value is dependent on the value of the financial instruments it invests in, and which allows for diversification of investment risk, has increased dramatically in Canada in the last decade or so (Stromberg, 1998: 24). Mutual fund assets stood at C\$394 billion at the end of 1998, up from \$30 billion in 1989. Seven million Canadian households hold at least one mutual fund (Senate, 1997: 5: 76). There are more than 1,300 mutual funds in Canada, sold by more than 80,000 registrants at brokers, mutual fund dealers, independent distributors and banks. A recent report (Stromberg, 1998: 135) points out that ‘there are now more investment funds in Canada than there are stocks listed on Canadian stock exchanges’.

This phenomenon has resulted in a dramatic upgrading of regulatory oversight of mutual fund operations, which has taken a variety of forms. The link between regulation of investment in mutual funds and saving for retirement has been acknowledged by David Brown, the current Chair of

the Ontario Securities Commission (OSC), the provincial government regulator of mutual funds.<sup>14</sup> In one of the first speeches of his tenure, given to the Investment Funds Institute of Canada in July 1998 he said, ‘At the present time we do not have the tools to cope with a serious market reversal. Nor would we have answers for investors whose savings comprise these billions of dollars as to why their retirement dreams may have been lost’. The regulatory initiatives that have been taken in Ontario over the last few years to reduce the market risk faced by individual pension investors include: the commissioning by the Canadian Securities Administrators, an umbrella organization for provincial securities commissions, of a member of the OSC to make recommendations for regulating investment funds (Stromberg, 1995); the establishment of a selfregulatory organization – the Mutual Fund Dealers Association (MFDA) – to govern mutual fund dealers selling products to the public; new regulatory instruments governing sales practices engaged in by mutual funds (NI 81–105), and a simplified prospectus system for mutual funds (NI 81–101); a variety of enforcement initiatives targeted at mutual funds and their dealers, including a compliance review of 23 mutual fund dealers conducted over a two-year period; and hearings against specific fund managers suspected of violating provisions of securities legislation and regulation. The regulatory infractions involved include failures to disclose conflicts of interest in advice-giving and inappropriate investment advice given to inexperienced investors (*DeLellis, Mersch*). These regulatory initiatives are premised on the recognition that

individuals saving for their retirement through RRSPs and mutual funds do not typically make investment decisions themselves but rely on intermediaries and financial ‘experts’ of one kind or another to do so for them.

The recent frenzy of legal and regulatory activity has culminated to date in another report authored by Commissioner Stromberg, this time for Industry Canada (Stromberg, 1998), which is oriented towards ‘consumer’ protection. This report advocates the recognition of what is described as the ‘retailization’ of the financial marketplace, and specifically the diffuse nature of the market for investment products. One of its most striking features is the recommendation that individuals be offered the opportunity to learn how to manage investment risks, including the ‘risk inherent in being too conservative’, along with support for investor economic education at a young age in the interests of enhancing ‘wealth management’ (Stromberg, 1998: 28; Appendix D: 2). In other words, the report posits that future pensioners need to be educated to accept risks, and it is further observed that this education would ‘facilitate the implementation of a broader range of governmental initiatives in the area of pension and other retirement benefit programs including the increased privatization thereof’ (Stromberg, 1998: 68). Should these recommendations be adopted by regulatory authorities, they would clearly further a neoliberal agenda of individualized acceptance of market risk in pension provision. While these recommendations are presented, again, in gender-neutral terms, the data presented above on gender-based differences in RRSP investment suggest that women are less well positioned to generate

adequate retirement income by means of investment in mutual funds. Furthermore, there is interesting empirical work to be done to investigate the extent to which individual investment strategies are gendered and how intermediaries construct the 'risk profiles' of their clients in accordance with selfregulatory codes. The feminist economics literature suggests, in general, that the 'rational actor' model of market decision making may itself be gendered (England, 1993; Ferber and Nelson, 1993).

As a result of this regulatory activity, the legal relationship between investors and their financial intermediaries is in the process of being redefined. This is also occurring through the courts, in the context of civil actions launched by individual investors alleging breach of fiduciary duty (*Hodgkinson v. Simms* [1994] 3 S.C.R. 377). The risk of private investing is being actively reshaped by tax, securities and tort law. Indeed, a plurality of regulatory mechanisms, some familiar from private, corporate law contexts, and others staples of administrative regulation, are being pressed into the service of facilitating financial market-based retirement well-being for those who can afford to avail of it. The existence of this legal code, addressing issues of risk management and techniques of investor accountability (Condon, 1996; Rose, 1996: 350–1) amply demonstrates that this is not an unfettered market, but in fact relies on considerable legal resources to support it. Deregulation is not at all the order of the day in this sphere. Taking the CPP and mutual fund developments together, however, it is possible to see that the role of the state, through legal governance, is shifting towards structuring market risk and away from the

direct provision of financial benefits, which will have the effect of producing further material inequality.

### CONCLUSION: HOW SHOULD FEMINISTS RESPOND?

In its focus on individualized risk and its deemphasis of redistribution, the pension privatization debate in Canada is a classic example of what Rose calls the 'death of the social'. Yet the consequences of this demise vary according to gender, sexuality and class position. Thus, the marketization of the CPP, illustrated by the investment strategy adopted and the inequitable increase in contribution requirements, can be contrasted with the tax revenue-based support of RRSP investment, which helps to ensure that wealthy workers will get wealthy pensions. All of this presents a dilemma for feminist political and legal strategizing, since feminists have historically relied on or exhorted the state to recognize and act upon the need for gender-sensitive decommodification. As Fraser puts it, the 'welfare state is crucial for gender relations' (1998: 55). Fraser herself argues that feminists need to abandon the effort to achieve two competing visions of the 'feminist welfare state', which she describes as the 'universal breadwinner' model and the 'caregiver parity' model. In the first, the universal breadwinner model, the goal is for women's work lives to become the same as men's, while the ideal of caregiver parity would 'revalue feminine life patterns'.<sup>15</sup> Fraser claims that neither can ensure

gender justice because neither fully integrates redistributive goals with recognition of gender difference. The universal breadwinner model 'valorizes men's traditional sphere', while the caregiver model would 'entrench gender disparities in income' and institute a 'mommy track' (1998: 59). Rather, her own blueprint would advocate a third alternative to 'deconstruct the genderbased differentiation of breadwinning and caregiving'. Specifically, it would require restructuring the organization of work by 'envisioning a society in which women's current life-patterns are the norm for everyone' (1998: 63–4). Thus, social and political institutions should be redesigned to ensure that men, like women, combine caregiving with breadwinning, and that the practical difficulties of doing this are eliminated. Translated into the pension context, this would likely require pension entitlements to be more fully cognisant of the need to fulfil both roles, the need to take time out of the paid labour force, the need to work part-time, the need to have careers flexible enough to accomodate workplace and caring labour, and in general to decrease the link between pensions and the paid labour market.

The problem with this of course, is that the opportunity for feminists to push the welfare state in this direction (Donnelly, 1993) is receding under the onslaught of market-oriented policy making, bringing with it new inequalities of gender-based risk. As Rose puts it, 'the state may no longer be assuming responsibility for the management of a whole variety of risks' (1996: 338). So feminist strategizers face a real dilemma of whether to pursue efforts to reinvigorate the redistributive goals of the welfare state,



for example, by moving away from labour market-based benefits to universal ones, or on the other hand, to reorient themselves to engage with the increasing role played by the state in securing the control of market risk through legal and other governance mechanisms. A few, admittedly speculative, comments may be offered on this question. With respect to the former option, it would seem important not to abandon redistribution as a collective commitment, but rather to keep that normative goal alive. Part of the approach here may involve seeking to deconstruct the opposition often posed between redistribution and market norms, by pointing out, as some economists have argued, that markets may have a redistributive effect (Bromley, 1997). It may also be possible, in this era of 'post-social politics' (O'Malley et al., 1997), to seek new rationales for redistribution. With respect to the latter option, an aspect of the agenda here might be, as I have suggested earlier, to interrogate the techniques and goals of accountability, accomplished via legal mechanisms, of those institutions involved in financial market pension provision, and indeed to reinvigorate wider discourses of accountability than are countenanced by a focus on risk management (Valverde et al., 1999). Another, broader possibility is to render explicit the connections between the distribution of pension provision by means of the market, and questions of just how pension contributions to mutual funds, pension funds and the CPP fund are invested. As Blackburn points out, the murkiness of this connection at present is in part due to the private law norms that govern investment by these institutions (1999: 6–7, 36–8). Although the preremptory way in which

NAC's proposal for 'ethical investment criteria' was dismissed in the CPP debate may not augur well for this endeavour in Canada, it is a central component of a contemporary feminist analysis of pensions.

## NOTES

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1. This project, funded by the Canadian Social Sciences and Humanities Research Council and based at Osgoode Hall Law School's Institute of Feminist Legal Studies, is entitled 'Feminism, Law and the Challenge of Privatization'.
2. The programme in fact represents a cluster of three benefits: (1) Old Age Security (OAS), based on age (65 years) and years of residence in Canada; (2) Guaranteed Income Supplement (GIS), providing additional benefits to those with low incomes, with the benefits payable varying with marital status; and (3)

Spouse's Allowance, providing further benefits to those who are spouses of OAS recipients, or survivors aged 60 to 64 years.

3. Note that CPP also pays disability benefits to those of pre-retirement age who are eligible.
4. Statistics Canada does not use the benchmark of 'poverty line', but rather the term 'low income'. This is defined as spending at least 20 percent more of pretax income than the Canadian average on food, shelter and clothing.
5. Participation in employer-based pension funds will not be dealt with in this article. The salient points here, according to Townson (1997: 30–40) are that as nonstandard work increases, employer-based pension coverage is declining, and the coverage of women workers is, accordingly, lower than that of men.
6. According to the Consultations Secretariat, these consultations were held between 15 April and 10 June 1996 in 33 sessions held in 18 cities.
7. Time out of the paid labour force to raise children under the age of seven and 15 percent of the lowest earning years can be dropped out of the calculation of the 'contributory period' on which benefits are based.
8. *Canadian Charter of Rights and Freedoms*, s. 15. This reconsideration has resulted in the passage in June 2000 of a Federal Modernization of Benefits and Obligations Act (S.C. 2000, c.12). Among other changes, this extends the survivor and pension-sharing benefits of CPP to 'commonlaw partners', defined as 'a person who is cohabiting with the contributor in a conjugal relationship' and who has so cohabited 'for a continuous period of at least one year'.
9. This change was apparently made to bring CPP 'in line with the majority of private plans'.
10. The list of women's organizations who participated in the public consultations

about CPP included the Manitoba Action Committee on the Status of Women, British Columbia Farm Women's Network, National Association of Women and the Law, Northwest Territories Status of Women, Yukon Status of Women, Manitoba Women's Advisory Council, the Older Women's Network Metro Toronto and Area Council, Disabled Women's Network, and l'Association feminine d'éducation et d'action sociale.

11. While the investment figure stands at C\$11.9 million (as of March 1999), the Board is expected to receive C\$66 billion of funds over the next 10 years.
12. These investment managers, Toronto Dominion Bank and Barclays Global Investors Canada Ltd were chosen in March 1999.
13. However, in December 1999 a federal/provincial review of the CPP approved a shift to 'active management' of 50 percent of the fund.
14. Regulation of mutual funds in Canada is provincially based, with the main body of governing legislation located in provincial Securities Acts.
15. These competing visions have manifested themselves in the past in difficulties for Canadian feminist activists in developing a consistent position on pension reform (Vickers et al., 1993).

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